Filed 12/15/14 In re Joshua R. CA1/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re JOSHUA R., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. JOSHUA R., Defendant and Appellant.	A139883 (Solano County Super. Ct. No. J42138)

Appellant Joshua R.[1] appeals from the juvenile court's jurisdictional and dispositional orders. He contends there were evidentiary errors during the jurisdictional hearing and two of the probation conditions imposed by the court are unconstitutional. We reject his challenges to the juvenile court's jurisdictional order but remand for modification of the two challenged probation conditions.

PROCEDURAL BACKGROUND

The Orange County District Attorney filed an amended petition under section 602 of the Welfare & Institutions Code alleging that appellant committed a lewd act on a child under the age of 14 by use of force (Pen. Code, § 288, subd. (b)(1)) on or about

[1] Because appellant is a minor, we refer to him by his first name and last initial to protect his identity in this proceeding. (Cal. Rules of Court, rule 8.401(a)(2).)

April 1, 2013, and a lewd act on a child under the age of 14 (Pen. Code, § 288, subd. (a)) on or about May 7, 2013.

The Orange County juvenile court sustained the allegations. The matter was transferred to Solano County for disposition. The Solano County juvenile court adjudged appellant a ward of the court and placed him on probation.

This appeal followed.

FACTUAL BACKGROUND[2]

In April and May 2013, the eight-year-old victim lived in a two-bedroom apartment with her family, including her 14-year-old half brother, appellant. Appellant and the victim have the same mother.

On April 1, 2013, the victim's parents were out having dinner and appellant and the victim were in appellant's bedroom. Appellant held the victim down, removed her clothes, and put his penis against the outside of her vagina. Something white that appellant called "sex pee" came out of appellant's penis.[3]

On May 7, 2013, the victim's parents were at a boxing class. The victim was watching television in the living room, and appellant grabbed her by the arm and pulled her into a bedroom and onto her parents' bed. Appellant shut the bedroom door and pulled off the victim's clothes. Then, as described by the victim at the jurisdictional hearing, appellant "tried to put his private part in my part about 19 times, one time hard." She told a child abuse interviewer that appellant put his penis against the outside of her vagina.

The mother of appellant and the victim, Blanca R. ("Mother"), returned home and opened the door to her bedroom. The victim appeared as if she had been crying and her

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[2] There are various differences in the victim's descriptions of the details of the incidents underlying the jurisdictional allegations. Our factual background summarizes the evidence in the light most favorable to the juvenile court's findings. (*In re Arcenio V.* (2014) 141 Cal.App.4th 613, 615.) Appellant does not dispute the sufficiency of the evidence supporting those findings.

[3] The victim did not testify to the April incident at the jurisdictional hearing, but she described the incident to a child abuse interviewer on May 16, 2013.

shorts were not on properly. The victim was looking at the bedroom closet, and Mother discovered appellant in the closet with an erection and zipping up his pants. The victim did not initially tell Mother what had happened, but after about 15 minutes Mother warned the victim, "Tell me the truth, otherwise the police will come and get both of you." In response, the victim said appellant "tried to put his private part in my private part just a little bit."

Appellant testified at the jurisdictional hearing and denied sexually assaulting his sister.

DISCUSSION

I. *Appellant Has Not Shown the Juvenile Court Committed Prejudicial Error In Permitting Mother to Testify After the Victim*

Penal Code section 868.5, subdivision (a) provides that when a person is charged with a qualifying sexual offense, a prosecuting witness "shall be entitled, for support, to the attendance of up to two persons of his or her own choosing, one of whom may be a witness . . . ." (See also Welf. & Inst. Code, § 676.5, subd. (a).) In the event a support person is also a witness, their testimony "shall be presented before the testimony of the prosecuting witness." (Pen. Code, § 868.5, subd. (c).)

In the present case, the People sought to have Mother and a victim witness advocate as the victim's support persons at the jurisdictional hearing. Appellant objected to Mother being one of the support persons because Mother was a "material witness." Appellant argued, "I think credibility issues are at stake. There's certain statements that I think may be inconsistent between [Mother and the victim] and I think the presence of [Mother] during . . . the alleged victim's testimony may hamper full or accurate statements by . . . the victim." The juvenile court raised the possibility of Mother testifying first, but the People suggested it would not be helpful because Mother would probably need to be recalled after the victim's testimony. The court permitted Mother to be a support person and the victim testified before Mother.

On appeal, appellant contends it was a violation of Penal Code section 868.5 for the victim to testify before Mother. The People contend appellant forfeited the argument

below because he did not reference that statute or argue that allowing the victim to testify first would influence Mother's testimony. Appellant argues his objection was sufficient to preserve the issue for appeal. (See *People v. Kabonic* (1986) 177 Cal.App.3d 487, 496 (*Kabonic*) ["It is obvious from this context that the basis of appellant's objection was section 868.5 thus encompassing all of its procedural requirements."].)

We need not decide whether appellant forfeited the contention because, in any event, appellant has not shown it is "reasonably probable" he was prejudiced by any error. (*Kabonic, supra,* 177 Cal.App.3d at p. 498.) Appellant has not shown in what material respects Mother may have "tailor[ed] . . . her testimony to match that of" the victim. (*Id.* at p. 495.) Appellant argues there is evidence Mother may have exerted influence over the victim with respect to the abuse allegations. However, although those considerations may have been relevant to the question of whether Mother should have been permitted to be a support person (*Id.* at p. 498), appellant does not contend the juvenile court erred in allowing Mother to be a support person. If Mother's presence did influence the victim's testimony, it did so whether Mother testified first or not; appellant has not shown how he was prejudiced by Mother testifying after the victim.

II. *The Juvenile Court Did Not Abuse Its Discretion In Admitting the Video and Transcript of the Child Abuse Interview of the Victim*

"Section 1360 allows the court to admit a child's hearsay statement describing an act of child abuse upon that child provided three conditions are met: (1) the court finds that the time, content and circumstances of the statement provides sufficient indicia of reliability; (2) the child either testifies at the hearing or there is corroborating evidence of the hearsay statements; and (3) the proponent of the statement gives notice to the adverse party that it intends to use the statement at trial." (*People v. Brodit* (1998) 61 Cal.App.4th 1312, 1329 (*Brodit*).) In the present case, the juvenile court admitted into evidence, over appellant's objection, the video and transcript of a May 16, 2013 interview

of the victim conducted by an interviewer with the Child Abuse Services Team ("CAST").[4]

Appellant contends the juvenile court erred in finding the victim's statements to the CAST interviewer were reliable. In admitting the CAST interview, the court acknowledged the relevant factors are outlined in *Brodit, supra,* 61 Cal.App.4th 1312 and *People v. Eccleston* (2001) 89 Cal.App.4th 436, and reasoned that the interview was conducted a "short time" after the May 7, 2013 incident; the victim's interview responses were similar to her trial testimony; she did "not appear to have any motive to fabricate"; she was "particularly specific in her statements in the CAST interview"; and she "corrected the interviewer several times throughout the interview." Those are appropriate considerations, the court's reasoning is sound, and appellant has not shown other considerations compelled the court to conclude the statements in the CAST interview were unreliable. Appellant has not shown the juvenile court abused its discretion.[5] (*Brodit*, at p. 1330.)

III. *Appellant Has Not Shown The Juvenile Court Abused Its Discretion In Admitting The Victim's Spontaneous Statement to Mother*

At the jurisdictional hearing, Mother testified that, 15 minutes after she discovered the victim and appellant in her bedroom, the victim told her that appellant "tried to put his private part in my private part just a little bit." That out-of-court statement by the victim was admitted as a spontaneous statement under Evidence Code section 1240.[6]

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[4] The Child Abuse Services Team is referred to only as CAST in the record, but the parties agree what the acronym stands for.

[5] Appellant also contends admission of the victim's statements to the CAST interviewer violated his rights under the Confrontation Clause to the United States Constitution. However, under *Crawford v. Washington* (2004) 541 U.S. 36, 68–69, appellant's confrontation rights were satisfied by the victim's availability for cross-examination at the jurisdictional hearing.

[6] Evidence Code section 1240 provides, "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

Appellant contends the juvenile court abused its discretion (*People v. Thomas* (2011) 51 Cal.4th 449, 496), because the testimony at the jurisdictional hearing showed the victim made the statement at issue days after the May 7 incident. However, the testimony before the juvenile court at the time of the ruling indicated the victim made the statement the night of May 7. At the jurisdictional hearing, Mother answered a sequence of questions about the May 7 incident and then testified the victim made her first statement that appellant touched her "that night." She explained the victim was "crying" and seemed "very scared." The prosecutor asked, "And how long had it been since you had first walked in the door and when she was crying and scared and told you some of what had happened?" Mother responded, "No more than 15 minutes." The prosecutor then asked, "And what did you ask her that made her tell you what had happened . . .?" Mother responded, "I said, 'Tell me the truth, otherwise the police will come and get both of you.' " The prosecutor followed with the question, "And when you said that, what did she tell you?" Appellant's counsel made a hearsay exception and the juvenile court found the victim's response was admissible under Evidence Code section 1240. Mother testified the victim said appellant "tried to put his private part in my private part just a little bit."[7]

Appellant points to testimony during the cross-examination of Mother that suggests the victim did not accuse appellant of sexual abuse the night of May 7, 2013. In particular, Mother admitted that, when she contacted the police on March 10, she did not tell them the victim said appellant abused her. And Mother did not, during the cross-examination, repeat her assertion that the victim made the sexual abuse accusation the night of May 7. However, because the testimony contemporaneous with the juvenile court's evidentiary ruling clearly indicated the statement at issue was made 15 minutes after Mother's return, the trial court did not abuse its discretion in admitting the hearsay as a spontaneous statement. (*People v. Welch* (1999) 20 Cal.4th 701, 739 (*Welch*) ["We

[7] The victim testified she told Mother what appellant had done "when [Mother] came home." At another point in her testimony she testified she did not recall when she told Mother.

review the correctness of the trial court's ruling at the time it was made, however, and not by reference to evidence produced at a later date."]; see also *People v. Greenberger* (1997) 58 Cal.App.4th 298, 336 [rejecting challenge to admission of statement based on evidence not before court at time of ruling].)

In any event, it is not reasonably probable admission of that single statement resulted in prejudice to appellant, in light of the victim's testimony and statements to the CAST interviewer. (*Welch*, *supra*, 20 Cal.4th at p. 750.)[8]

IV. *Two of the Juvenile Court's Probation Conditions Must Be Modified*

Among other probation conditions, appellant was directed to have no unsupervised contact with anyone under twelve years of age and not to possess pornography. Appellant contends the no-contact order is unconstitutionally vague and overbroad and the no-pornography order is unconstitutionally vague. The People agree knowledge requirements should be added to both orders, but otherwise argue the conditions are proper.

"[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' [Citation.] The rule of fair warning consists of 'the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders' [citation], protections that are 'embodied in the due process clauses of the federal and California Constitutions. [Citations.]' [Citation.] The vagueness doctrine bars enforcement of ' "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." [Citation.]' [Citation.] . . . In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that 'abstract legal commands must be applied in a specific context,' and that, although not admitting of 'mathematical certainty,' the language used must have ' "reasonable specificity." ' " (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*).) "A probation condition 'must be sufficiently precise for the probationer to know what is required of

[8] We also reject appellant's claim of cumulative prejudice.

him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness. [Citation.] A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad. [Citation.]" (*Ibid.*)

A. *The No-Contact Condition*

The juvenile court ordered appellant to have no contact with "juveniles under age 12 without appropriate adult supervision." Appellant contends the condition is void for vagueness because it does not contain a knowledge requirement and does not define what constitutes "contact." We agree with the parties that the condition should be modified to include a requirement that appellant know the juvenile at issue is under the age of 12. (*Sheena K., supra*, 40 Cal.4th at pp. 890–892.) Without an express knowledge requirement, appellant could unwittingly violate the condition because he may be unaware that a juvenile he has contact with is under the age of 12. (See *People v. Pirali* (2013) 217 Cal.App.4th 1341, 1350 (*Pirali*).)

Appellant also argues the absence of a definition of "contact" renders the condition void for vagueness. He argues, "the juvenile court did not specify whether appellant was prohibited from having physical contact with children under twelve, from speaking or communicating electronically with them, or merely being in proximity to them even in a public place." The juvenile court's comments suggest the court intended to prohibit personal contact, because the court stated, "[appellant] cannot be unsupervised around children under the age of 12. No kids come over to your house. They are not to be there. If there are younger members in your family, they can only be there with adult supervision." On the other hand, the People assert "[a] reasonable person would understand 'contact' to mean contact of any kind, including personal contact of the type referenced by the court, communication through other people, or communication via electronic media." Thus a disconnect exists between the juvenile court's comments and the definition urged by the People on appeal. Because we remand for the juvenile court

to modify this condition to add a knowledge requirement, we direct that the court also clarify the term "contact."[9]

B. *The No-Pornography Condition*

Appellant contends the probation condition prohibiting him from possessing "pornographic material" is unconstitutionally vague because it does not contain a knowledge requirement and does not define "pornographic material." The juvenile court ordered, "Minor shall not possess any pornographic material, including accessing, downloading, or viewing internet pornography."

Appellant cites to the Ninth Circuit's decision in *United States v. Guagliardo* (9th Cir. 2002) 278 F.3d 868, 872, which concluded "a probationer cannot reasonably understand what is encompassed by a blanket prohibition on 'pornography.' The term itself is entirely subjective; unlike 'obscenity,' for example, it lacks any recognized legal definition." (See *Farrell v. Burke* (2d Cir. 2006) 449 F.3d 470, 489 (*Farrell*).) *Guagliardo* pointed out that the district court itself could not define the term, which left the defendant "in the untenable position of 'discovering the meaning of his supervised release condition only under continual threat of reimprisonment, in sequential hearings before the court.' " (*Guagliardo*, at p. 872.) The Ninth Circuit also reasoned that the probation officer's authority to interpret the restriction did not cure the vagueness problem, because the delegation "creates 'a real danger that the prohibition on pornography may ultimately translate to a prohibition on whatever the officer personally finds titillating.' [Citation.] A probation officer could well interpret the term more strictly than intended by the court or understood by [the defendant]." (*Ibid.*)

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[9] Appellant's contention the no-contact condition is an unconstitutionally overbroad restriction on his right to association is largely based on the absence of a knowledge requirement. We reject his additional argument it is overbroad because it prohibits contact in public places. It was not unreasonable for the juvenile court to conclude unsupervised contact with minors in public could present a risk of misconduct by appellant. (See *In re Byron B.* (2004) 119 Cal.App.4th 1013, 1016 [discussing review of juvenile probation conditions].)

A vagueness challenge to a no-pornography condition was considered in *People v. Turner* (2007) 155 Cal.App.4th 1432. In that case, the court considered a probation condition that the defendant " '[n]ot possess any sexually stimulating/oriented material deemed inappropriate by the probation officer and/or patronize any places where such material or entertainment is available.' " (*Id.* at p. 1435.) The issue considered by the court was not the absence of a definition of "sexually stimulating/oriented material" per se, but the requirement that the defendant guess what material would be " 'deemed inappropriate by the probation officer.' " (*Id.* at p. 1436.) The court of appeal resolved the problem by adding a knowledge requirement that the defendant have " 'been informed by the probation officer that such material is inappropriate.' " (*Ibid.*; accord *Pirali, supra,* 217 Cal.App.4th at p. 1352.)

We agree with the parties that a knowledge requirement is necessary for the no pornography condition to pass constitutional muster. On remand, the juvenile court should modify the condition along the following lines: "Minor shall not possess any materials he knows are pornographic or the probation officer has informed minor are pornographic, including accessing, downloading, or viewing internet pornography." Appellant could be found in violation of that condition if he possesses materials he knows are pornographic, even without a previous warning from the probation officer regarding the materials at issue. We recognize the term "pornographic" remains undefined, and is subject to different interpretations at the margins. However, because appellant can only be found in violation if he *knew* or had been advised by his probation officer that the materials were pornographic, the condition only encompasses materials that are indisputably pornographic.

DISPOSITION

The matter is remanded with instructions that the juvenile court add a knowledge requirement to the no-contact and no-pornography probation conditions, and clarify the term "contact" as used in the no-contact provision. In all other respects, the judgment is affirmed.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.